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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-936

Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

UNITED STATES OF AMERICA,

Petitioner,

—v.—

WILLIE ROBINSON, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

Interest of *Amicus Curiae**

The American Civil Liberties Union is a nationwide, non-partisan organization of over 180,000 members, solely dedicated to the defense of those principles safeguarded by the Bill of Rights. During its fifty-three year existence, the ACLU has been concerned with both the Fourth Amendment's protection of personal security and the constitutional imperative of judicial integrity. The issues in this

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* Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

case go to the heart of both concerns, for the Court is being asked to relax the former and to ignore the latter. For the reasons set forth *infra*, at this point in American constitutional history it is singularly important that the Court reject such arguments.

Summary of Argument

I.

The primary issue in this case is the permissible scope of a search incident to an arrest for a traffic violation. The Government argues broadly that the Fourth Amendment permits a police officer to conduct a full scale search of the person incident to an arrest for a traffic violation. *Amicus* urges that no such search of the person is constitutionally valid. In such circumstances a protective weapons search is the maximum permissible intrusion on individual privacy, and then only if other facts give rise to a reasonable apprehension of danger incident to the custodial arrest for a traffic violation. *Terry* v. *Ohio*, 392 U.S. 1 (1968). In any event, the search here was unreasonable because it exceeded even the permissible limits of a self-protective weapons search. *Chimel* v. *California*, 395 U.S. 752 (1969). Finally, the fact that this search was validated by police department regulations can in no way justify it.

II.

Continued enforcement of Fourth Amendment safeguards requires that the exclusionary rule not be tampered with or modified in any way.

The law enforcement argument is that, in the context of traffic arrests, the exclusionary rule will have no deterrent

effect because police will search whenever they feel the need to, regardless of what this Court says. Completely overlooked is the fact that the exclusionary device also serves a purpose no less important than deterring illegal police conduct, namely, the imperative of judicial integrity. *Mapp* v. *Ohio*, 367 U.S. 643 (1961); *Elkins* v. *United States*, 364 U.S. 206 (1960). That imperative prohibits judicial complicity in violations of the Fourth Amendment and surrender of judicial responsibility to law enforcement officials. *Johnson* v. *United States*, 333 U.S. 10 (1947). Finally, the alternatives proposed are little more than a plea for reliance on the subjective good faith of law enforcement officials, a standard never accepted by this court. *Beck* v. *Ohio*, 379 U.S. 89 (1964); *United States* v. *United States District Court*, 407 U.S. 297 (1972).

Argument

Introduction

None of the law enforcement briefs filed in this case (as well as in *Gustafson* v. *Florida*, No. 71-1669) mention the following fact: as of 1971, there were almost 113 million motor vehicles registered in the United States, of which almost 93 million were passenger vehicles.[1] These statistics bear an enormous significance for the issues in this case, for they demonstrate that we have become a nation of motorists. And in all probability, the only adversarial encounter that the average citizen will ever have with a policeman will occur when the citizen is behind the wheel of his car and is stopped for violation of a traffic regula-

[1] *Automobile Facts and Figures*, Automobile Manufacturers Association of the United States (1972).

tion. Thus, the powers which the law enforcement officials seek to have conferred in this case have a potential impact on virtually every American.

Moreover, the powers sought are potent ones. The court is being asked to ratify the proposition that a policeman may conduct a full blown search of any motorist whom he arrests for a violation of the traffic laws. And although in this case the requirement that the officer make an actual arrest for the particular traffic offense was mandated by regulation, in many jurisdictions the determination is discretionary with the officer, and the range of traffic offenses for which an arrest can be made is wide. If the government's theories prevail, the decision to arrest in any particular traffic encounter will increasingly turn on whether the policeman wants to conduct a search. The potential for harassment and abuse is obvious. And if the Government's effort to undermine the exclusionary rule also succeeds, even less incentive will remain for the police to honor the Fourth Amendment's safeguards in their encounters with the citizen-motorist.

That is the context in which the constitutional issues in this case must be evaluated.

I.

An arrest for a traffic violation does not, *per se*, justify a full scale search of the person.

The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, Supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Whatever may have been the confusion surrounding the proper interpretation of the "reasonableness clause" and the "warrant clause," it is now abundantly clear that "the most basic constitutional rule in this area is that '. . . searches conducted outside the judicial process, without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.'[2] The exceptions are 'jealously drawn,'[3] and there must be 'a showing by those who seek exemption . . . that the exigencies of the situation made that course imperative.'"[4] *Coolidge* v. *New Hampshire,* 403 U.S. 443 at 454-55 (1971). Thus, the starting point for resolving the constitutional

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[2] *Coolidge* v. *New Hampshire,* 403 U.S. at 454-55 quoting from *Katz* v. *United States,* 389 U.S. 347, 357 (1967).

[3] *Coolidge* v. *New Hampshire, supra,* quoting from *Jones* v. *United States,* 357 U.S. 493, 499 (1958).

[4] *Coolidge* v. *New Hampshire, supra,* quoting from *McDonald* v. *United States,* 335 U.S. 451, 456 (1948).

questions posed by this case is that the warrantless search is presumptively unreasonable and that the burden is on the Government to demonstrate that it was "imperative" to search respondent incident to his arrest for a minor traffic violation.

A. *The Fourth Amendment does not permit any search of an individual arrested for a traffic violation absent facts indicating the individual is armed and dangerous.*

Courts have traditionally spoken of the "search incident to an arrest" as an exception to the general proscription of warrantless searches. The Government here seeks to bring this particular variety of searches within that exception. However, a search does not become constitutionally valid simply because it is conducted at the time of an arrest. Rather, it is essential for the Government to establish that the circumstances of the arrest rendered the search "imperative".[5] We submit that no search of respondent at the time of his arrest can be constitutionally justified, because the circumstances of his arrest did not render that course necessary, and the rationale behind the "search incident" exception is not applicable to an arrest for a routine traffic violation.

It is a long established principle, enunciated in numerous decisions of this Court, that a search incident to an arrest is valid only insofar as its purpose is to discover "fruits, implements or evidence" of the crime for which the arrest

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[5] "'A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.'" *Chimel* v. *California*, 395 U.S. 752, 759 (1969), quoting from *Trupiano* v. *United States*, 334 U.S. 699, 708 (1948).

is made or weapons which may be used to effect an escape. See *Weeks* v. *United States*, 234 U.S. 383, 392 (1914); *Carroll* v. *United States*, 267 U.S. 132, 158 (1925); *Preston* v. *United States*, 376 U.S. 364, 367 (1964); *Sibron (Peters)* v. *New York*, 392 U.S. 40, 67 (1968); *Chimel* v. *California*, 395 U.S. 752, 762-63; Note, *Searches of the Person Incident to a Lawful Arrest*, 69 Colum. L. Rev. 866, 868 (1969). The rationale for permitting such a warrantless evidentiary search grows out of the inherent necessities of the situation at the time of the arrest which render such a search reasonable—that is, evidence relevant to the crime may be searched for and seized because it is capable of concealment or destruction before a warrant may be obtained.[6] However, this justification for the conduct of warrantless searches incident to arrest does not obtain in the situation of routine traffic violations. Most arrests for traffic law infractions will not involve fruits, instrumentalities or evidence capable of concealment.[7] In this case, as is conceded, there was no evidentiary basis for the search. There are no fruits of the crimes of driving with a revoked operator's permit and obtaining a new permit by misrepresentation. The only instrumentality of these crimes is the automobile, itself. And when the respondent handed the fraudulently obtained license to the officer, he had secured the only evidence of the crimes for which the arrest was made.

Thus, the only possible basis for a search incident to a traffic arrest is a self-protective search for weapons which may be used to frustrate the arrest and effect an escape. We submit that a self-protective weapons search

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[6] See, e.g., *Chimel* v. *California*, 395 U.S. 752, 763 (1969); *Preston* v. *United States*, 376 U.S. 364, 367 (1964).

[7] See, e.g., *People* v. *Superior Court (Simon)*, 101 Cal. Rptr. 837, 848, 496 P.2d 1205, 1216 (1972) *(en banc)*.

may not be undertaken unless objective facts known to the officer make it reasonable for him to believe that the traffic violator is both armed and dangerous. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 30 (1968). Under the Fourth Amendment the central inquiry in a search conducted of the person of an accused is not whether or when an arrest has taken place, but rather, the reasonableness of the action taken in light of the circumstances. *Terry* v. *Ohio, supra* at 19. In order to assess the reasonableness of an officer's conduct, "it is necessary 'first to focus upon the governmental interest which allegedly justifies official intrusion upon constitutionally protected interests of the private citizen,' for there is 'no ready test for determining reasonableness other than by balancing the need to search [or seize] against the invasion which the search [or seizure] entails.'" *Terry* v. *Ohio, supra*, at 20-21.[8] A self-protective search for weapons, even when characterized as a "frisk," is a substantial intrusion on individual privacy, "which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." *Terry* v. *Ohio, supra* at 17. This is no less true when the weapons search follows rather than precedes an arrest.

On the other side of the balance is the law enforcement officer's safety. Yet, despite this very weighty consideration, this Court did not permit a search incident to *every* police-citizen encounter. Rather, in view of the substantial invasion of individual privacy entailed by a search for weapons, this Court struck the balance so as to permit a law enforcement officer to conduct a search only when he can point to objective facts which make it reasonable for

[8] Quoting from *Camara* v. *Municipal Court*, 387 U.S. 523, 534-35, 536-37 (1967).

him to conclude that the individual with whom he is dealing is armed and dangerous. *Terry* v. *Ohio, supra* at 27. *Sibron* v. *New York,* 392 U.S. 40, 64 (1968). Our police are in no less of a need to disarm those whom they confront on the street about to perpetrate crimes of violence than they are when undertaking an arrest. Indeed, it is frequently difficult to tell when a street confrontation between a law enforcement officer and a citizen has ripened into an arrest. See *Terry* v. *Ohio, supra* at 13. In short, the risk to the officer is created by the circumstances of the confrontation taken as a whole and not by the technicalities of the law of arrest. The question in either case is whether the officer can reasonably believe that a weapon will be used against him. See *People* v. *Superior Court (Simon), supra* at 1218.

We submit that the mere commission of a traffic violation does not, without more, give rise to a reasonable belief that an individual is armed and dangerous. The vast majority of motorists who commit traffic rule infractions are law abiding citizens. "A motorist who exceeds the speed limit does not thereby indicate any propensity for violence or iniquity, and the officer who stops the speeder has not even the slightest cause for thinking that he is in danger of being assaulted." *People* v. *Marsh,* 20 N.Y.2d 98, 101, 281 N.Y.S.2d 789, 792, 228 N.E.2d 783, 786 (1967) (Fuld, C.J.). Thus, a warrantless search for weapons incident to an arrest for a traffic infraction should not be permitted absent special facts or circumstances which lead the officer to reasonably conclude that the individual with whom he is dealing is armed and dangerous.*

* In the instant case, no such special facts or circumstances are present. At no time did Officer Jenks even suspect that the re-

Many federal and state courts have reached the result urged here—that no search may be made incident to a traffic violation arrest absent specific facts reasonably suggesting a motorist is armed and dangerous. See, e.g., *United States* v. *Davis*, 441 F.2d 28 (9th Cir. 1971); *People* v. *Superior Court (Simon), supra; People* v. *Marsh, supra.* To hold the contrary, i.e., that an officer may search anyone arrested for any traffic violation, would constitute an "'intolerable and unreasonable' intrusion into the privacy of the vast majority of peaceable citizens who travel by automobile." *People* v. *Superior Court, supra* at 1219. In 1971, there were 112,922,354 motor vehicles registered in the United States of which 92,752,515 were passenger cars. Each year American automobile manufacturers, alone, have total sales of 10,637,738 of which passenger cars account for 8,584,592. *Automobile Facts and Figures,* Automobile Manufacturers Association of the United States (1972). The rule this Court announces in this case will have a very real effect upon each and every driver of these approximately 100 million automobiles, and under the *Chimel* "grabbing distance—confederate" rule, potentially their passengers as well. Every one of these millions of individuals would be subject to search in the discretion of a police officer. If the police are permitted to routinely search

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spondent might possess a weapon. At no time did he believe himself in danger nor did he articulate any facts which would have made such a fear reasonable. There is no indication that respondent was anything but cooperative during the course of any of his encounters with Officer Jenks. In fact, Officer Jenks indicated that he had no particular purpose in searching respondent. He just searched him and didn't think about what he was looking for. Whatever merit there may be in arguing for a rule which permits a protective search incident to an arrest for a traffic infraction, such an argument would certainly not apply to the facts of this case.

all those they arrested for motor vehicle regulation infractions, the police would be encouraged to make custodial arrests rather than to merely issue citations or summonses.

Although in this case a custodial arrest was required by regulation, in most instances the choice will repose in the police officer, and a holding that police may summarily search all traffic law violators will promote the potential abuse of that discretion. When added to the generally held police power to routinely stop and question all motorists for license and registration spot checks, the assault upon Fourth Amendment rights looms as an omnipresent potential. Indeed, the "warrant requirement" of the Fourth Amendment would become for all time the exception rather than the rule. The invasion on privacy would be substantial —First, the interference with individual liberty involved in the routine stop; second, the arrest and the ensuing greater invasion into individual freedom of movement resulting therefrom; and third, the search itself. To permit the search of anyone arrested for a traffic violation puts the Fourth Amendment rights of every citizen in the hands of the police. Under such a view, the businessman who inadvertently leaves his registration or license at home, and the fleeing felon who "runs" a series of stop signs are equally subject to arrest and search. The Fourth Amendment does not permit such a result. In this situation the only constitutionally reasonable warrantless search is that which is necessary and the only search which is necessary is that of an arrestee who may reasonably be believed to be armed and dangerous. Absent special factors or circumstances, the ordinary traffic violator who is cooperative at all stages of the encounter, who will not be held in jail detention, is not such a person.

B. *The search in this case cannot be justified as a valid self-protective weapons search.*

Even if a protective weapons search was reasonable incident to the respondent's arrest for a traffic offense, the search of respondent was unconstitutionally broader than a permissible weapons search. A search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable scope and intensity. *Terry* v. *Ohio*, 392 U.S. 1, 17-18 (1968); see *Chimel* v. *California, supra*. The only constitutionally acceptable search is that which is "'strictly tied to and justified by'" the circumstances which rendered its initiation permissible. *Terry* v. *Ohio, supra*, at 19. The only object which may be justifiably searched for incident to an arrest for a traffic offense is a weapon which may be used to attack the officer and effect an escape. Only the safety of the officer justifies the initiation of the search and all that is permitted is that which will provide for the officer's safety.

Amicus submits that in removing the crumpled cigarette package from respondent's pocket and in opening that package and searching its contents, Officer Jenks exceeded the scope of a properly circumscribed protective weapons search. The decision of this Court in *Peters* v. *New York*, 392 U.S. 40 fixes the outer boundaries of the constitutional scope of a search incident to an arrest. A police officer searching the person of an arrestee is not entitled to "engage in an unrestrained and thorough going examination" of the arrestee's person and his personal effects. *Sibron* v. *New York, supra* at 67. Rather, according to *Peters*, he is permitted, first, only to pat down the individual, and then to invade his privacy only when he feels an object capable of being used as a weapon.

In this case, Officer Jenks never believed the crumpled cigarette package was a weapon. At best, one could say he did not know what it was, but at no time did he feel himself in danger of attack. A protective weapons frisk of the kind approved in *Terry* v. *Ohio, supra* was sufficient to establish that respondent was unarmed. To reach into respondent's pocket, to seize the cigarette package, and to open it and to search its contents was to allow the search to degenerate into an unreasonable, unrestrained, indiscriminate search of respondent and his possessions which bore no relation to the circumstances which justified it at its inception.

The law enforcement briefs argue that the protection of the officer requires that he conduct a full scale search incident to any arrest, even for a traffic infraction. However, this argument ignores the other half of the balance required of Fourth Amendment analysis—the interests of the individual in preserving his personal privacy. The question is not so much how much safety does the police officer require, but rather, how much privacy must be sacrificed to secure that safety. See *Terry* v. *Ohio, supra* at 24-25. Even a "frisk" for weapons is a significant intrusion on individual privacy. It is suggested that reaching into respondent's pockets and searching the cigarette package did not constitute a significant increment in the invasion of privacy. However, that final increment, like the proverbial straw, followed an initial "routine" stop, a subsequent investigative stop, an arrest, a search, and finally a search and seizure of the cigarette package. In short, the petitioner had yielded a substantial amount of privacy to the

police, and the police, in turn, had achieved only the most minimal increase in their safety.[10]

Indeed, total protection cannot be achieved absent conceding the power to "strip search" every motorist arrested for a traffic violation. Granting the police the power to conduct a "full-field search," ignoring the substantial invasion of privacy that will ensue, will achieve something less than absolute protection.[11]

Moreover, in arguing that a "full-field search" incident to every arrest for a traffic violation should be permitted, law enforcement officials are asking this Court to engage in the assumptions first, that every traffic violator is armed; second, that every traffic violator who is armed will use his weapon; and third, that every traffic violator will so conceal his weapon that a "pat down" search will fail to discover it. To permit such categorical, generalized assump-

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[10] There is "no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." *Chimel* v. *California*, 395 U.S. 752, 767 n. 12 (1969).

[11] We do not minimize the tragic fact that many police officers are slain in the line of duty. We do question, however, the conclusion that this fact compels the surrender of Fourth Amendment rights. In relation to the number of stops made for traffic infractions, the number of incidents of violence in the course of such stops is very small. In addition, most assaults on police officers will occur immediately upon the officer approaching the automobile, before the officer would even have the opportunity to search. Granting the police the broad power to conduct a "full-field search" will not add to the protection provided police officers.

It is important to note that the highest courts in the nation's two largest states have rejected the claims that the police advance here. See *People* v. *Superior Court (Simon) supra; People* v. *Marsh, supra;* see also, *People* v. *Adams*, —— N.Y.2d ——, 13 Cr. L. Rep. 2239 (1973).

tions is to ignore the "demand for specificity in the information upon which police action is predicated" which "is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry* v. *Ohio, supra* at 21 n. 18. To engage in such generalized assumptions is to "invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction." *Terry* v. *Ohio, supra* at 22. These assumptions are not the sort of "specific reasonable inferences" which an officer is entitled to draw from the mere fact of a traffic violation. *Terry* v. *Ohio, supra* at 27. See also, *People* v. *Superior Court (Simon), supra* at 1219.

If only a self-protective search for weapons is permissible incident to an arrest for a traffic infraction, then the issue comes down to the proper scope of such a weapons search. And that issue is controlled by this Court's decision in *Peters* v. *New York (Sibron* v. *New York)*, 392 U.S. 40 (1968). First, the officer must conduct a pat down. He is justified in intruding further only after discovering an object which might reasonably be believed to be a weapon. If this were not the rule, then, in fact, there is no difference between a search just for weapons and a search for evidence and weapons. That is, a weapons search would be just a thoroughgoing, unrestrained, general search of the person and his possessions because almost any object can be "unidentified" or "unidentifiable" when merely felt through the outer clothing. Wallets, key cases, pens and the like which are commonly carried on the person will subject the individual to the further intrusion of their seizure and search. Whatever might be said in regard to other cases, in this case the officer did not believe that the cigarette package respondent carried was a weapon when he seized it.

Because of the potential for abuse, the lower federal courts have been careful to confine weapons searches to their proper scope. They have consistently held invalid searches which have extended beyond the person of the suspect. See, e.g., *United States* v. *Day*, 455 F.2d 454 (3d Cir. 1972); *United States* v. *Collins*, 439 F.2d 610 (D.C. Cir. 1971); *United States* v. *Hostetter*, 295 F. Supp. 1312 (D. Del. 1969). They have invalidated searches of objects removed from the person of the arrestee because adequate protection is provided by placing the object out of the arrestee's reach. See, e.g., *United States* v. *Collins, supra* at 618, *United States* v. *Day, supra*. Even where the search has been confined to the person of the suspect, lower courts have carefully scrutinized the scope of the search and held unlawful those which were impermissibly broad. In *Tinney* v. *Wilson*, 408 F.2d 912 (9th Cir. 1969), a valid search became unconstitutional when upon feeling a small object, the officer squeezed it to ascertain its nature. See also, *United States* v. *Del Toro*, 464 F.2d 520 (2d Cir. 1972).

We submit, therefore, that the search here exceeded the only object which justified its inception—a protective search—and is thereby unreasonable.

C. *That the search was undertaken pursuant to routine police procedures does not legitimate an otherwise unconstitutional search.*

The Fourth Amendment commands that the search of any individual must be undertaken pursuant to specific and articulatable facts and not official, general prejudgments embodied in routine procedures. *Terry* v. *Ohio, supra* at 21, n. 18. Moreover, the Fourth Amendment commands that the determination of whether a search is justified is to

be made by a neutral magistrate and not the police. See *Johnson* v. *United States*, 333 U.S. 10 (1947). To hold that an otherwise unlawful search is reasonable because it was undertaken pursuant to routine police procedures is to vest sole responsibility for upholding Fourth Amendment rights in the police and to abdicate judicial responsibility for enforcing constitutional rights. The Metropolitan Police Department cannot authorize its individual members to break the law.

The lower Federal courts have been steadfast in their refusal to sanction searches just because undertaken pursuant to routine procedures. See, e.g., *United States* v. *Davis, supra*. The mere recitation of the words "routine police procedures" do not exempt police activity from the restrictions imposed by the Fourth Amendment. If police regulation can prescribe unconstitutional action, it can just as easily prescribe only constitutional action.

II.

Continued enforcement of the exclusionary rule is essential to preserve the Fourth Amendment's safeguard against police intrusion upon the security of the citizen and the constitutional imperative of judicial integrity.

Once again, law enforcement officials mount their attack upon the exclusionary rule, as though its elimination or modification would dramatically alleviate the problem of crime in America. The argument runs as follows: (1) the rule does not deter police misconduct, if the police really want to search a person, they will go ahead and do so; (2) the rule only benefits the criminal, allowing the guilty to go free as a consequence of the constable's blunder, (3) therefore, at the very least, the rule should be modified and made applicable only to "serious abuses" of the Fourth Amendment. Virtually ignored in the argument is the other purpose of the rule—the imperative of judicial integrity. Achieving that purpose alone is sufficient justification for continued and unswerving application of the rule.

A. *The imperative of judicial integrity.*

The Government directs its attack upon the exclusionary rule to the issue of deterrence, deliberately failing to acknowledge that this Court is being asked to participate in and sanction prosecutorial deprivation of constitutional liberties. To find, on the one hand, that the state has violated a defendant's Fourth Amendment rights in obtaining evidence against him, and then to find, on the other hand, that his conviction based upon such evidence has been obtained consistent with the requirements of due process

of law is unacceptable logic. Particularly at this point in our constitutional history this Court should not lend its offices to such use of illegally seized evidence.

In *Weeks* v. *United States*, 234 U.S. 383 (1914) and again in *Mapp* v. *Ohio*, 367 U.S. 643 (1961), this Court unequivocably found that the exclusionary rule is constitutionally required and implicit in the Fourth Amendment. In this case the Court is being asked not just to overrule *Mapp*, but to overrule *Weeks* as well. As was stated in *Weeks* v. *United States*, *supra* at 393, the Fourth Amendment would hardly be worthy of inclusion in our Constitution absent the exclusionary rule.[11] In the 60 years since the decision in *Weeks*, this Court has not departed from the essential core of that case: that the exclusionary rule is constitutionally required. See *Elkins* v. *United States*, 364 U.S. 206, 208, 210; *Mapp* v. *Ohio*, 367 U.S. 643.[12]

Moreover, the exclusionary rule of the Fourth Amendment is similar to principles underlying enforcement of the Fifth. This Court has repeatedly noted the close connection between the two. In *Mapp* v. *Ohio*, *supra*, this Court stated:

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[11] "If letters and private documents must be seized and held and used in evidence against the citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as others thus placed are concerned, might as well be stricken from the Constitution."

[12] The opinion in *Mapp* v. *Ohio* repeatedly stresses the constitutional character of the exclusionary rule. There the court stated: "this Court has . . . required of federal law officers a strict adherence to that command which this Court has held to be a clear, specific, and constitutionally required—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.'" (Quoting from Holmes, J., *Silverthorn Lumber Co.* v. *United States*, 251 U.S. 385, 392), 367 U.S. at 648.

> And nothing could be more certain than that when a coerced confession is involved, 'the relevant rules of evidence are overridden' without regard to 'the incidence of such conduct by the police,' slight or frequent. Why should not the same rule apply to what is tantamount to coerced testimony by way of unconstitutional seizure of goods, papers, effects, documents, etc. We find that as to the Federal Government, the Fourth and Fifth Amendments and, as to the States, the freedom from unconscionable invasions of privacy and the freedom from convictions based upon coerced confessions do enjoy an 'intimate relation' in their perpetuation of 'principles of humanity and civil liberty [secured] . . . only after years of struggle.' . . . They express 'supplementing phases of the same constitutional purpose—to maintain inviolate large areas of personal privacy.' *Mapp* v. *Ohio, supra* at 656-57 (footnotes and citations omitted).

And, as Justice Black stated:

> when the Fourth Amendment's ban against unreasonable searches and seizures is considered together with the Fifth Amendment's ban against compulsory self-incrimination, a constitutional basis emerges which not only justifies but actually requires the exclusionary rule. *Mapp* v. *Ohio, supra* at 662 (concurring opinion).

Thus, the exclusionary rule is constitutionally required as part and parcel of the right of privacy guaranteed by the Fourth Amendment and by the Fourth taken together with the Fifth Amendment.[14]

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[14] The Government's argument that some lower courts have only required substantial but not formal compliance with the warnings

And the enforcement of these provisions by use of the exclusionary device is compelled not only by the need to preserve those constitutional protections, but also by what has been described as the "imperative of judicial integrity." *Elkins* v. *United States*, 364 U.S. 206, 222 (1960). When this Court permits the introduction of unconstitutionally seized evidence, it sanctions the illegal conduct which produced it. Were this Court to reverse itself and permit the introduction of evidence illegally seized in this case, it would appear to bestow approval on unlawful police conduct.

But, it is argued, permitting the criminal to go free because the police officer erred is too drastic and costly a remedy for Fourth Amendment violations. However, Justice Clark answered this argument over a decade ago:

> The criminal goes free, if he must, but it is the law that sets him free. Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence. *Mapp* v. *Ohio, supra,* at 659.

We submit that the choice between the competing demands of individual privacy and law enforcement is foreclosed to this Court. The men who authored the Fourth Amend-

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set forth in *Miranda* v. *Arizona*, 384 U.S. 436 (1966) misses the mark. *Miranda* warnings are a tool, albeit an important one, for insuring that a confession is truly voluntary and therefore that its admission into evidence does not offend the constitutional privilege. The warnings are but a part of the determination that police conduct has violated the Fifth Amendment. Here, however, the determination that a constitutional violation has occurred has already been made prior to and independently of the question of remedy. The real issue is what courts should do in the face of police conduct which directly, not secondarily, violates a constitutional safeguard.

ment made the choice—they determined that American society has more to fear from governmental misconduct than from individual violations of law. As Justice Brandeis stated:

> Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of criminal law the end justifies the means . . . would bring terrible retribution. Against that pernicious doctrine this Court should resolutely set its face. *Olmstead* v. *United States,* 277 U.S. 438, 485 (1928) (dissenting opinion).

It is the government's duty to uphold the law not violate it. And the judiciary as part of the government has a special duty to scrupulously guard against official lawlessness. *Weeks* v. *United States,* 234 U.S. at 391-92.

The Fourth Amendment requires that the judiciary, not the police, determine the permissibility of any invasion of individual privacy. In effect the law enforcement officials are arguing for the abdication of the constitutionally required judicial responsibility for interpreting the Fourth Amendment by claiming that the policeman in the field should be the final arbiter of any individual's constitutional rights. However, this argument misses the point of the Fourth Amendment. The warrant clause is not without meaning simply because the search in the instant case was undertaken without a warrant. Rather, the warrant clause means that the police officer in the field has no greater

power to undertake a search than a magistrate has to authorize one if he were at the officer's elbow. The Government's argument here is precisely the opposite, for it is contended that the police officer has the power to undertake a search that a neutral magistrate could not authorize. This argument was answered over a quarter of a century ago by Justice Jackson:

> When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent. *Johnson* v. *United States*, 333 U.S. 10, 14 (1947).

That a search was undertaken without a warrant does not alter the role of the judiciary in determining the propriety of a search. If a search is found to be unreasonable, it is the duty of the Court to put the victim of the search in the position he would be in had the search not been conducted.[15] It is almost too familiar to bear repeating that a search may not be justified by what it uncovers. Yet the argument here, if accepted, would achieve precisely that prohibited result.

B. *Deterrence of illegal police conduct.*

Reduced to its essentials, the law enforcement argument is that the exclusionary rule will not prevent police from

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[15] This principle distinguishes the harmless error cases which the Government relies on. In those cases, the constitutional error played no role in the defendant's conviction, and the government was placed in the same position it would have been in had it not sought to use redundant evidence. Here, by contrast, the illegally-seized evidence is almost always the entire basis for the prosecution's case. Such evidence can rarely be characterized as "harmless," and certainly never harmless beyond a reasonable doubt.

conducting any particular search felt to be necessary. Even assuming the factual validity of a proposition which runs contrary to decades of judicial experience, it is an unseemly premise upon which to base constitutional doctrine.

It is important to recognize at the outset that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice apparatus. Thus the exclusionary rule is not truly a sanction directed at the individual police officer, either by its terms or by its effect, hence the absence of any terms placing "blame" on the police officer. The rule exists to enforce the Fourth Amendment throughout the criminal justice system, from the officer on the beat, to the magistrate, to the prosecutor, to the trial judge. Without sanctions such as the exclusionary rule, court pronouncements on the meaning of the Fourth Amendment will fall on deaf ears as they did prior to *Mapp*. See, J. Skolnick, JUSTICE WITHOUT TRIAL, 219-220 (1966). Any failings of the exclusionary rule to date can, in large part, be ascribed to shortcomings in the translation of judicially articulated values to police work values. See, Le Fave & Remington, *Controlling the Police: the Judge's role in making and reviewing Law Enforcement Decisions*, 63 Mich. L. Rev. 987 (1965).

One solution is for prosecution and police officials to educate the police officer on the beat as to his constitutional obligations. Much has been accomplished in the last six years. Since the President's Commission on Law Enforcement and Administration of Justice proposed in 1967 that all police departments employ full or part-time legal advisers (The Challenge of Crime in a Free Society, 114), over 100 metropolitan police departments have established

such positions. One function for these advisers, only recently coming into vogue, has been to make rules for police conduct in typical, on-the-street situations. Police training manuals have likewise undergone substantial revisions with new emphasis being placed on constitutional and statutory obligations in police work. Progressive departments are encouraging their officers to take on new training and education programs which, among other things, sensitize police officers to the mandates of the Constitution.

Indeed, in the very jurisdiction from which this case arose, the police have experimented with an even more far-reaching mechanism for the legal education of their officers, described by Chief Jerry Wilson and Department General Counsel Geoffrey Alprin:

> In the District, we have recently begun an experiment for surfacing, for the benefit of higher officials in the Department, those non-prosecuted cases which before have never reached the attention of the courts and seldom have been reviewed within the Department. In cooperation with the local United States Attorney's Office, the Department has created a specialized unit, staffed with police officials, with responsibility for reviewing every case which is dropped by the prosecutor, for whatever reason. Errors in police procedures, whether of exclusionary rule character or not, are brought to the attention of the offending officer and his commanding official, who is required to insure that the officer is counselled and instructed in proper processes. The Case Review Section maintains records by officer and unit so that recurrent patterns of misconduct or procedural error can be observed and cor-

rected. In those areas where direct Department orders apply, as, for example, the identification of automobile search orders, egregious or repetitive errors may be dealt with through the Department's disciplinary processes. To offset particularly significant patterns adversely affecting prosecution of cases, members of the Section regularly instruct recruit and in-service training classes at the Department's Academy. Statistics are maintained by the Section and are available to the public. J. Wilson and G. Alprin, *Controlling Police Conduct: Alternatives to the Exclusionary Rule*, 36 Law & Contemp. Prob. 488, 498-99 (1971).

Such examples of the rising degree of professionalism in police departments around the country should increase the likelihood that judicial pronouncements will be obeyed. And the exclusionary rule has played an important role both in initiating the trend and in maintaining it. What the description of Wilson and Alprin tells us is that the better-run police departments in this country place a very high value indeed on conviction rates. The Case Review Section was born out of a desire to reduce the "no paper" or no court action rate of the prosecutor's office, estimated by the authors at better than twenty per cent, a substantial portion of which results from exclusionary rule violations. We believe that the exclusionary rule is largely responsible for bringing police departments out of the era of the third degree, that police departments are becoming increasingly sensitive to constitutional limitations as they affect conviction rates (and not out of any new-found altruism), and that future refinement of police procedures is largely dependent on retention of the exclusionary rule and the addi-

tion of affirmative sanctions and remedies for gross forms of police negligence and willful misconduct.[10]

In fact, the police regulation practice involved in this case is an example of the increasing likelihood of police adherence to constitutionally required procedures. As the metropolitan police force has attempted to issue guidelines to regulate the conduct of the police officer in the field, there is a greater likelihood that decisions of this Court will be communicated to the individual police officer. If Officer Jenks could conform his conduct to an unconstitutional departmental regulation, it is just as easy for him to conform his conduct to departmental regulations which incorporate constitutional standards.

There is simply no reason why constitutional safeguards and effective law enforcement cannot coexist. As the late J. Edgar Hoover, certainly no critic of law enforcement prerogatives, put it:

> One of the quickest ways for any law enforcement officer to bring public disrepute upon himself, his organization and the entire profession is to be guilty of a violation of civil rights. Our people may tolerate many mistakes of both intent and performance, but, with unerring instinct, they know that when any person is intentionally deprived of his constitutional rights those responsible have committed no ordinary offense. A crime of this nature, if subtly encouraged by failure to condemn and punish, certainly leads down the road to totalitarianism. *FBI Law Enforcement Bulletin*,

[10] Indeed, last year the law enforcement argument against the exclusionary rule was that by virtue of this increased professionalism, the rule was no longer necessary; the police would police themselves.

September, 1952, pp. 1-2, as quoted in *Elkins* v. *United States*, 364 U.S. 206, 218-19 n. 8 (1960).

This court should follow that counsel. The only truly effective police department is the department which obeys the law. If the lawbreaker goes free it is not because the law is in error, but rather because the police failed to abide by the law. This Court should reaffirm its adherence to the exclusionary rule which "gives, to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and to the courts, that judicial integrity so necessary in the true administration of justice." *Mapp* v. *Ohio, supra* at 660.

C. *The proposed alternatives.*

As alternatives to the inadmissibility of illegally seized evidence, the law enforcement officials suggest adoption of a "substantial violation" balancing test, composed of a number of factors which would be consulted to determine if the policeman's admittedly unconstitutional conduct was sufficiently egregious to warrant the exclusionary sanction. These proposals, for the first time, introduce subjective elements into Fourth Amendment jurisprudence, a kind of "shocks the conscience" approach which was rejected in *Mapp*. Indeed, such a test was rejected even by a Court which purported to follow the "old" due process test. Justice Jackson had this to say about the "substantial violation" test urged here:

> We are urged to make inroads upon *Wolf* by holding that it applies only to searches and seizures which produce on our minds a mild shock, while if the shock

> is more serious, the states must exclude the evidence or we will reverse the conviction. . . . We think . . . that a distinction of the kind urged would leave the rule so indefinite that no state court could know what it should rule in order to keep its processes on solid constitutional ground. *Irvine* v. *California*, 347 U.S. 128, 133-34 (1954).

If the law regarding search and seizure is indefinite now, and deterrence is impossible because the police officer on the beat cannot know what conduct is prohibited, the officer will be more confused under petitioner's "substantial violation" test. Deterrence will then be rendered hopeless. If the substantive law of the Fourth Amendment is uncertain, consider the uncertainty inherent in a case-by-case evaluation by all the trial judges in the country of what "substantial violation" means. Courts will be asking themselves whether the police officer conducted a "reasonable or unreasonable" unreasonable search. It is difficult to imagine a rule which would cause greater confusion to the average police officer.

In effect, what petitioner and *amici* urge is that every individual's Fourth Amendment rights will be determined by the police officer on the beat subject only to his good faith. However, this Court has consistently refused to make good faith the measure of the Fourth Amendment. "[S]imple 'good faith on the part of the arresting officer is not enough.' . . . If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects,' only in the discretion of the police." *Terry* v. *Ohio*, *supra* at 22 (quoting from *Beck* v.

Ohio, 379 U.S. 89, 97). The good faith of a police officer in conducting a search is difficult to measure and such a subjective test will turn a defendant's trial into the trial of the police officer. The whole instinct of the Court's Fourth Amendment jurisprudence is opposed to such reliance on the good faith of law enforcement officials to respect the citizen's right to privacy. See, e.g., *United States* v. *United States District Court*, 407 U.S. 297 (1972).

In this case, the government is proposing a seemingly circumscribed and reasonable alteration of the exclusionary rule. A century ago this Court warned against such slight and well-intentioned incursions on constitutional safeguards:

> It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure . . . . It is the duty of courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachment thereon. *Boyd* v. *United States*, 116 U.S. 616, 635 (1886).

And just recently, Chief Judge Kaufman of the Second Circuit reminded us of the same principles:

> We often speak of governmental interests as opposed to individual rights. We should realize, however, that it is the government's principal duty to safeguard individual liberties if it is to continue to serve the people well.

Of course, we all suffer when, in Cardozo's classic phrase, the criminal goes free because the constable has blundered. *People* v. *DeFore*, 242 N.Y. 13, 21 (1926). The remedy however is to help the constable not to blunder. The problem of crime, particularly the diabolical crimes charged in the indictment here, is of great concern to us. But if we reflect carefully, it becomes abundantly clear that we can never acquiesce in a principle that condones lawlessness by law enforcers in the name of a just end. *United States* v. *Huss*, —— F.2d —— (2d Cir., No. 73-1920, June 26, 1973), *Slip op.* at 4467-68.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

*Attorneys for Amicus Curiae**

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